No. 3059

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

ASH SHEEP COMPANY, a Corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

This is an appeal from a judgment entered in the District Court of the United States for the District of Montana, herein on the 24th day of January, 1917, against plaintiff in error and in favor of defendant in error, adjudging that plaintiff in error, who was also plaintiff in the lower court recover nothing against defendant by reason of said action (Tr. pp. 39-40).

The suit is one brought by plaintiff in error to recover from defendant a penalty in the sum of $7100.00 under the provisions of section 2117 of the Revised Statutes of the United States.

The complaint alleges the corporate existence of defendant in error and that its business was that of stock raising and grazing — particularly sheep (Tr. p. 2); that certain lands, described in the complaint, and owned by the United States, and situate, lying and being within the original boundaries of the Crow Indian Reservation and forming a part thereof, in the state and district of Montana, and were opened to settlement under the terms of the Act of Congress approved April 27, 1904 (34 Stat. L. 352) upon which no settlement or allotment had been made and to which the Indian title had not been extinguished (Tr. pp. 2-3), Par. II, III and IV of complaint); that on or about July 13, 1913, the defendant in error in violation of Section 2117 Revised Statutes of the United States, without the consent or permision of the Crow tribe of Indians, drove, ranged, fed and grazed and caused to be driven, ranged, fed and grazed upon the lands described and other vacant lands of the same character about 7100 head of sheep, for which judgment for $7100, the penalty of $1.00 per head for each of said sheep is prayed (Tr. pp. 3-4).

Defendant in error was duly served with process (Tr. p. 7); filed a demurrer to the complaint which it withdrew (Tr. p. 8); and thereafter filed its answer. The answer is voluminous but briefly:

Admits the corporate existence of defendant in error, but denies it is now engaged in any business (Tr. p. 9).

Admits the allegations of paragraphs II, III and IV of the complaint, but denies any information and belief of any knowledge of the Indian title to the land (Tr. p. 9).

Denies the driving of the sheep upon the lands, except as qualified by the separate defenses and denies that plaintiff in error is entitled to the penalty (Tr. p. 9).

The answer sets up as a separate defense (Tr. pp. 10-12) that defendant in error had been extensively engaged in the sheep business and owned and leased divers tracts of lands upon that portion of the Crow Indian Reservation upon which the lands described in the complaint were situated and herded and grazed some of its sheep on such lands as were owned and leased by it (Tr. pp. 10-11); that in getting its sheep on to the lands owned and leased by it as aforesaid, defendant in error drove its sheep across the lands described in the complaint (Tr. pp. 11-12); and for a further defense to the complaint defendant in error pleaded as a further defense that the relief sought in the case at bar plaintiff in error is estopped from prosecuting this case for recovery of the penalty of $7100 because plaintiff had elected to sue for damages in a certain action and had recovered $1.00 damages (Tr. pp. 12-31).

Thereafter plaintiff in error served and filed its reply denying all new matters alleged in said answer as a defense to said complaint, and alleged affirmatively and by admissions the proceedings whereby an injunction was obtained against de-

fendant and damages for $1.00 found in favor of plaintiff (Tr. pp. 33-37).

Thereafter defendant in error moved the court in writing for judgment on the pleadings herein (Tr. p. 37); which motion was by the court granted (Tr. p. 38) and judgment for defendant in error entered (Tr. p. 39) from which judgment this appeal is taken.

The District Court in granting defendant in error's motion for judgment on pleadings set forth its reasons for so doing (Tr. p. 38-39).

A writ of error to this court was asked for and granted (Tr. pp. 40-41) and assignment of errors filed contemporaneously therewith (Tr. pp. 42-44) and writ of error issued July 10, 1917 (Tr. pp. 46-47) citation was also duly issued, served and filed (Tr. pp. 46-47).

A reversal of the judgment appealed from is sought upon the following:

SPECIFICATIONS OF ERROR.

First: Because the court erred in finding that sheep are not animals within the provisions of Section 2117 of the Revised Statutes of the United States;

Second: Because the court erred in finding that sheep are not cattle within the provisions of Section 2117 of the Revised Statutes of the United States;

Third: Because the court erred in finding that sheep are not stock within the meaning of Section 2117 of the Revised Statutes of the United States

for which a person who drives or otherwise conveys them to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock;

Fourth: Because the court erred in refusing to find that sheep are cattle within the meaning of the provisions 2117 of the Revised Statutes of the United States;

Fifth: Because the court erred in refusing to find that sheep are animals within the meaning of the provisions of Section 2117 of the Revised Statutes of the United States;

Sixth: Because the court erred in refusing to find that sheep are stock within the meaning of Section 2117 of the Revised Statutes of the United States for which a person who drives or otherwise conveys them to range and feed on any land belonging to any Indian or Indian Tribe, without the consent of such Tribe, is liable to a penalty of one dollar for each animal of such stock.

Seventh: Because the court erred in granting the motion for judgment on the pleadings made by the defendant above named;

Eighth: Because the court erred in holding that under the pleadings herein the defendant was entitled to judgment in favor of said defendant and against said plaintiff;

Ninth: Because the court erred in rendering judgment herein in favor of the defendant and against said plaintiff;

Tenth: Because the court erred in entering

herein a judgment in favor of said defendant and against said plaintiff.

ARGUMENT.

Though there are ten assignments of error in this case, they may each and all be most properly considered together as the action of the lower court turned wholly upon the one proposition that "sheep" are not "cattle" within the purview of the Statute (Section 2117 Rev. Stat.)

In this connection we here beg to observe that the lower court seemed to be of the opinion that the meaning of the word "cattle" was the gist of the action. But in order that the trial judge's decision herein (Tr. pp. 38-39) may not be considered to be good for the general reference he makes to his former decision (U. S. v. Ash Sheep Co., 229 Fed. 480) when he says in the case at bar (Tr. p. 38) "Defendants motion for judgment on pleadings is granted. The reasons therefore are set out in U. S. v. Ash Sheep Co., 229 Fed. 480, paragraph 2 at least," we beg to leave to call this court's attention that the decision found in 229 Fed. 480 was rendered in the case which was decided by this court in 221 Fed. 587, and the decision in 229 Fed. 480 insofar as it departs from this court's decision in 221 Fed. 587 is bad law. It is most familiar law that the decision of an appellate court becomes the law of the case and is binding both on the lower court and the appellate court itself.

Standard Sewing M. Co. v. Leslie, 118 Fed. 557.

Oregon R. Co. v. Balfour, 90 Fed. 301.

So far as the decision herein is based on the decision in 229 Fed. 480, it should be confined solely to the trial judge's definition of the word cattle. The status of the lands involved is definitely settled so far as the United States District Court of Montana is concerned for it must accept the decision of this court and the decision in 221 Fed. 587 has never been reversed.

ARE SHEEP WITHIN THE STATUTE.

In considering this question we find a woeful lack of decisions that can be of much aid. The statute, Section 2117 United States Revised Statutes, never seems to have been a subject of judicial construction save in

U. S. v. Mattock, Fed. Case 15744,

where the United States District Court for Oregon held that sheep were within Section 2117, and in the decision above mentioned.

U. S. v. Ash Sheep Co., 229 Fed. 480.

In this case just cited, the lower court herein disregarded the decision in U. S. v. Mattock, *supra,* saying that it seemed to lay too much stress on the mischief intended to be prevented. We contend the Mattock case was the correct construction of section 2117. Judge Deady, in that decision, most fully treated every question that the lower court in the case at bar has decided against plaintiff in error, and the Mattock case, though of a district court decision is one that commands re-

spect, and should be followed herein. We refrain from quoting any part of the Mattock case as this court will undoubtedly prefer to read it in full.

In the case of U. S. v. Trice, 30 Fed. 495, it was said:

> "* * * * it would seem that the judicial definition always conforms to an enlarged or restricted interpretation, according to circumstances, the reasonable rule being to give that effect to the act which it shall appear from the words used, and the object to be accomplished, that the legislature wished to be done. Nor is the rule of strict construction for penal acts against this method of interpretation. U. S. v. Hartwell, 6 Wall. 385, 396; U. S. v. Mattock, 2 Sawy 148, 151, (Fed. Cases 15,744); The Bolina, 1 Gall 76, 83; U. S. v. Winn. 3 Simm. 309."

The quotation is most appropriate for Congress could not have intended to penalize the grazing or driving of cattle, (bovine) mules and horses only upon Indian lands and intended that the grasses could be ruined or eaten off by sheep. It was clearly in the mind of Congress to protect the grass upon ranges owned by Indians and Indian tribes *for upon such grass* the Indian has depended for sustenance of his herds of ponies and cattle, which have always been reckoned by the Red Man as his wealth and means of livelihood. It has only been within the last few years that the Indian has turned to an actual tilling of the soil as a means to live.

While penal statutes are to be construed strict-

ly, they are not to be construed so strictly as to defeat the obvious intention of the law making body.

> Wade v. U. S. 33 App. Csses (DC) 29; 17 Am. & Eng. Cases 707.

A statute may include by inference a case not originally contemplated when it deals with a genus within which another species is brought. Thus a statute making it unlawful wilfully to throw a stone at a railroad car, includes an inter-urban or traction railway car, although such cars were not known or in use at the time the statute was enacted.

> State v. Cleveland, 83 Ohio State 61; 93 N. E. 467.

So in the case at bar, although it may be as the trial judge said "sheep were not then ranged" (Tr. p. 28, line 21), still there is nothing in the record to show they were not ranged, we submit the word "cattle" includes sheep. The lower court itself says the word "cattle" embraces sheep and swine (Tr. p....., lines 7-9).

The Supreme Court of Illinois in the case of Ohio & M. R. Co. vs. Brubaker, 47 Ill. 462, which was an action against a railway company for the killing of an ass, in passing upon a statute requiring railway companies to erect and maintain fences "sufficient to prevent cattle, horses, sheep and hogs from getting upon said railway" said:

> "This statute is not, as assumed by counsel for appellants, a penal statute, and, therefore, to be strictly construed. It is, on the contrary, a remedial statute, imposing a reason-

able duty on railway companies, and furnishing a remedy to parties injured in case that duty is not performed. Its object was to protect domestic animals, and there can be no doubt the legislature intended to protect mules and asses as much as horned cattle, horses, sheep or hogs. Neither does the language of the statute create any difficulty in carrying out what we must presume to have been the legislative intent. The horse and the ass are both defined by lexicographers as "quadrupeds of the genus *equus*", and the term "cattle" is defined by the same authorities as including horses and asses as well as domesticated horned animals. There are, then, two terms used in the statute, in either of which the ass might be included."

In the case of People v. Barnes, et al. (Cal.) 2 Pac. Rep. 493, the definition of the word "cattle" as given by Worcester to be "a collective name for domestic quadrupeds, including the bovine tribe, also horses, mules, sheep," etc., is approved, and it is held in this case that the use of the word cattle included at least all these. See also.

Henderson v. Ry. Co., 81 Mo., 605-607.

The Supreme Court of the United States in Decatur Bank v. St. Louis Bank, 88 U. S. (21 Wall.) 294-299, held that the mere word "cattle" in a letter of credit given to a man to enable him to purchase cattle included within its meaning "hogs", so as to hold the giver of the letter of credit for moneys advanced on it that were used to purchase hogs. This case was cited and followed by the Supreme Court of North Carolina in State v. Groves, 119 N. C. 823; 25 S. E. 820, holding that

the term used in statute punishing abuse of cattle included goats.

In conclusion, we respectfully submit that the lower court erred in holding that no penalty was provided for by Section 2117 Revised Statutes upon one who drove and ranged or fed sheep upon Indian lands, and it was error to order and enter judgment for defendant in error. The judgment should be reversed with directions to the lower court to enter judgment in favor of plaintiff under the statute for the number of sheep plaintiff can prove were, on the land in violation of the statute. The admissions contained in defendants' answer herein (Tr. pp. 10-11) that it drove its sheep over this land entitle plaintiff to judgment as the reasons set forth in the answer for so driving the sheep do not relieve it of the penalty.

U. S. v. Lovering, 34 Fed. 715, 716.
Forsythe v. U. S., 63 S. W. 548.

Respectfully,
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